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IN THE

Supreme Court of the United States

October Term, 1965
No. 531

UNITED STATES OF AMERICA,

Appellant,

vs.

BEN BLUE,

Appellee.

BRIEF FOR APPELLEE.

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STATUTES INVOLVED.

Section 6861(a) Internal Revenue Code of 1954:

SEC. 6861. JEOPARDY ASSESSMENTS OF INCOME, ESTATE, AND GIFT TAXES.

(a) Authority for Making.—If the Secretary or his delegate believes that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of section 6213(a), immediately assess such deficiency (together with all interest, additional amounts, and additions to the tax provided for by law), and notice and demand shall be made by the Secretary or his delegate for the payment thereof.

Tax Court Rules of Practice (Rule 7)

RULE 7.—INITIATION OF A CASE—PETITION—FILING FEE—FORM

(a) Petition.—

(1) *Filing.*—A case shall be initiated by filing with the Court a petition consisting of an original and 4 complete, accurately conformed, clear copies, either printed or typed. (See Rules 4 and 6.)

(2) *Improper petition—Dismissal.*—Failure of a petition to comply with this Rule or with Rule 4 or 6 shall be ground for dismissal of the case. (See also section 6213 *(a)*, and section 7502, Code of 1954, in regard to absolute statutory time limit on filing.)

(b) Fee for filing petition.—The fee for filing a petition with the Court shall be $10, payable at the time of filing. (See Rule 1*(e)*.)

(c) Form of petition.—

(1) The petition shall be substantially in accordance with form a, shown in Appendix I.

(2) It shall be complete in itself so as fully to state the issues.

(3) No telegram, cablegram, radiogram, telephone call, or similar communication will be recognized as a petition.

(4) The petition shall contain:

(*A*) A caption in the following form:

Tax Court of the United States

.....	)	
Petitioner,	)	
v.	)	Docket No.
Commissioner of Internal Revenue, Respondent.	)	

Petition

(*B*) Numbered paragraphs stating:

1. Petitioner's name and principal office or residence, and the office of the director or district director of internal revenue in which the tax return for the period in controversy was filed.

2. The date of mailing of the notice of deficiency on which the petition is based, or other proper allegations showing jurisdiction in the Court.

3. The amount of the deficiency (or liability, as the case may be), determined by the Commissioner, the nature of the tax, the year or other period for which the determination was made and, if different from the determination, the approximate amount of taxes in controversy.

4. Clear and concise assignments of each and every error which the petitioner alleges to have been committed by the Commissioner in the determination of the deficiency. Issues in respect of which the burden of proof is by statute placed upon the Commissioner will not be deemed to be raised by the petitioner in the absence of assignments of error in respect thereof. Each assignment of error shall be lettered.

5. Clear and concise lettered statements of the facts upon which the petitioner relies as sustaining the assignments of error, except those assignments of error in respect of which the burden of proof by statute is placed upon the Commissioner.

6. A prayer, setting forth relief sought by the petitioner.

(*C*) The signature of the petitioner or that of his counsel. (See Rule 4(*f*).)

(*D*) A verification by the petitioner.

STATEMENT.

On November 1, 1962 Ben Blue was notified by the Chief of the Intelligence Division, Internal Revenue Service, that consideration was being given to a possible recommendation that criminal proceedings be instituted against him for attempted evasion of his income taxes for the years 1958 to 1960, inclusive, and the income taxes of Merry-Go-Round, Inc. his wholly owned corporation for the same three years. [R. p. 115.]

Ben Blue's counsel attended conferences with Internal Revenue Service officials in November, 1962 and March, 1963, with respect to the proposed prosecution.

In February and March, 1963 Ben Blue executed and filed consents extending the period of limitation for assessment of income taxes against himself and Merry-Go-Round, Inc. [R. pp. 12, 13.]

On April 9, 1963, without notice of any kind to Ben Blue, contrary to general procedure when a criminal investigation is pending, the District Director in Los Angeles made a jeopardy assessment against Ben Blue, Axie Blue (his wife), and Merry-Go-Round, Inc.

All known assets of Ben Blue, Axie Blue and Merry-Go-Round, Inc. were levied upon and seized. [R. p. 14.] The record is void of any evidence justifying the filing of the jeopardy assessments.

At the same time jeopardy assessments were made, the United States made income tax liens of public record pursuant to said assessments. [R. p. 7.]

In statutory notices of deficiencies subsequently issued by the Government for the years 1958 to 1960, inclusive, for Merry-Go-Round, Inc., Ben Blue and Axie Blue, it was conceded that the jeopardy assessments were excessive in amounts. [R. pp. 75-76; 87; 96-97; 103-104.] Nevertheless, the amounts of the liens which corresponded with the jeopardy assessment figures, admitted to be excessive, were never changed to reflect the lesser amounts of taxes. [R. pp. 44-45.]

Within sixty days of the filing of the jeopardy assessments, statutory notices were issued stating that the taxpayers must file Petitions within ninety days of the dates of the notices if the proposed deficiencies were to be contested in the Tax Court of the United States. Ben Blue having had all of his assets seized, could not pay the proposed assessments and had no choice but to file verified Petitions within that time to the Tax Court in order to protect his property. [R. p. 69.]

On August 5, 1964, more than a year after filing the petitions, a six count indictment was filed charging Ben Blue with wilful attempt to evade his personal taxes for the years 1958, 1959 and 1960 and with filing false returns for Merry-Go-Round, Inc. for the same years. [R. pp. 1-4.] The indictment involved the same income and the same years as the statutory notices

issued a year previously against Ben Blue and Merry-Go-Round, Inc. [R. pp. 1-4 and 70-106.]

Ben Blue filed a Motion to Dismiss the Indictment which came on for hearing February 8, 1965. After hearing witnesses and argument of counsel, the District Court granted the Motion and dismissed the indictment. [R. pp. 26-69.]

At the hearing on the Motion to Dismiss, the Assistant United States Attorney refused to stipulate that he had copies of Ben Blue's Petitions to the Tax Court in his file. Counsel requested the Court to order production of the Tax Court pleadings and the Court granted the request. The following colloquy occurred:

> "The Court: . . . and all I am ordering now is that you produce a copy of that petition, if you have it.
>
> Mr. Schulman: (Government counsel): I will stipulate, Your Honor, that each of the petitions filed by Ben Blue, Ben Blue and Axie Blue and Merry-Go-Round which has been referred to in the testimony so far are presently a part of the United States Attorney's case file.
>
> The Court: And came with the Special Agent's Report?
>
> Mr. Schulman: They came to us with the report when it was referred to us from the Department of Justice." [R. p. 51.]

At the hearing on the Motion to Dismiss, Robert Lund, Chief, Intelligence Division, Internal Revenue Service, testified that civil liabilities were generally not

assessed until after the criminal case had been disposed of. [R. p. 59.] With reference to determination as to when a jeopardy situation existed, he testified as follows [R. p. 60]:

> "Q. Are there times when civil liabilities are assessed before the criminal matter is disposed of? A. There have been.
>
> Q. What are the occasions or what are the situations when they are assessed before the criminal matter is disposed of? A. When the *investigating agents* determine that the tax might be in jeopardy because the assets might be dissipated or transferred or removed from the jurisdiction of the country." (Emphasis supplied.)

Ralph Leslie, the Revenue Officer who handled the levies and liens against the taxpayers, testified that he knew a criminal investigation was pending at the time he levied on Ben Blue's assets and filed the liens. He testified that he received information concerning Ben Blue's assets from Mr. Freeman of the Intelligence Division.

Within thirty days of the dismissal of the indictment the Government filed a notice of appeal which did not name the Court to which the appeal was taken. Nevertheless, the Clerk of the District Court referred the matter to the Court of Appeals for the Ninth Circuit. After filing the Notice of Appeal the Government filed a motion in the Court of Appeals to have the matter certified to this Court on the ground that the District Court had sustained a "plea in bar" and that §3731,

Title 18 U.S.C. authorized appeal. The Court of Appeals granted this motion. On January 17, 1966 this Court postponed consideration of the question of jurisdiction and placed the case on the summary calendar.

In summary, while consideration was being given to a possible recommendation of criminal prosecution, a jeopardy assessment was issued against Ben Blue and Merry Go-Round, Inc. All of Ben Blue's assets (amounting to more than $150,000) were seized and liens of record were filed. This was done without any notice to Ben Blue and there is not one iota of evidence in the record to justify the seizure of assets or the filing of liens. When the indictment was brought fourteen months later the petitions which Ben Blue had been forced to file in the Tax Court of the United States were in the United States Attorney's files and had been included with the file when it was forwarded to Los Angeles from the Department of Justice in Washington. That is, the United States Attorney's file included, at the time the matter was presented to the Grand Jury, petitions containing facts verified by Ben Blue which he had been required to file fourteen months earlier in order to protect his property.

SUMMARY OF ARGUMENT.

I.

This Court Does Not Have Jurisdiction of the Appeal.

Section 3731 of Title 18 U.S.C. provides for direct appeal to the Supreme Court "from the decision or judgment sustaining a Motion in Bar, when the defendant has not been put in jeopardy." The Court of Appeals decided to certify this appeal to the Supreme Court on the ground that the District Court dismissal would "bar further prosecution of the offense charged."

There are two definitions of "Motion in Bar." One interpretation is that which supports the certification herein. The other definition, is the one based on the historical meaning of a plea in bar. That is, a plea in bar involved previous acquittal, conviction, attainder or pardon. There is no previous acquittal, conviction, attainder or pardon as to Ben Blue.

Regardless of which interpretation is correct since the District Court dismissed the indictment on the ground the defendant could not have a fair trial (analogous to one under Rule 48(b) of the Federal Rules of Criminal Procedure) there is no appeal under §3731 of Title 18 U.S.C.

As was noted in *Carroll v. United States,* 354 U.S. 394, appeals by the Government in criminal cases are not favored. This does not deny the Government a remedy in case of arbitrary action by a District Court because the writ of mandamus is always available.

II.

The Decision of the District Court Is Correct and Should Be Affirmed.

The jeopardy assessment section of the Internal Revenue Code (§6861(a)) provides that "if the Secretary or his delegate believes that the assessment . . . will be jeopardized by delay" he may immediately assess a deficiency. Of course, the District Director in Los Angeles as the "delegate" does not have personal knowledge of the affairs of the millions of taxpayers in his district. As the testimony bears out [R. p. 60] the investigating officer is the one who really arrives at the "belief" necessary to recommend a jeopardy assessment. Mr. Freeman, Special Agent investigating the case, obviously the one who recommended the jeopardy assessment, told Revenue Officers what assets to seize at a time when his recommendation of prosecution of Ben Blue was moving through regular Government channels. The result of the jeopardy assessment was to compel Ben Blue to file Tax Court petitions. Facts which Ben Blue was required to verify in his Tax Court petitions constituted a vital part of the prosecutive file when it was in the Department of Justice in Washington and after it was transferred to the United States Attorney in Los Angeles.

It is not necessary to contend here that the jeopardy assessment provision (§6861(a)) or §7201 and §7206-(1) of Title 18 U.S.C. are unconstitutional because as was stated in *Yick Wo v. Hopkins,* 118 U.S. 356:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution."

The Chief of the Intelligence Division in the Los Angeles district testified that it was not common practice to make an assessment while a criminal investigation was in progress. In fact, his testimony was that he could not recall any case in his district where jeopardy assessment had been made in such a situation "besides the Ben Bue case in the last year". [R. p. 61.]

The record is devoid of any evidence supporting a justification for the jeopardy assessment. The only reasonable inference is that the Special Agent promoted that procedure to throttle Ben Blue economically and put him in a position where he was required to come forth with verified statements concerning the same income and the same years involved in the criminal prosecution. It is the Government's contention that the Tax Court petitions constituted nothing more than general denials. This completely ignores the fundamental nature of the pleading itself and, of course, once a petition is filed in the Tax Court the case is either settled or a trial is had in regular course.

The Tax Court operates independently of the United States District Court and grants continuances "within its discretion." (Tax Court Rule 20.) In *Chiquita Mining Co. v. Commissioner,* 148 F. 2d 306 (C. A. 9), it was held that refusal of the Tax Court to grant a continuance because of a pending related criminal case was not reversible error. Furthermore, under Rule 45 of the Tax Court rules the Government could have requested that a deposition be taken from Ben Blue. Thus, after the petition is filed depositions could be taken and the case heard before the criminal case comes to trial.

The Government contends that the petitions contained no incriminating statements but amounted to "a blanket denial of the allegations made in the deficiency notices." (Govt. Br. p. 17.)

It also urges that the only remedy is a Motion to Suppress. This is a specious argument in itself but, more importantly, it ignores one fundamental principle. That is: the accused has more than a right to have illegally obtained evidence suppressed or to present evidence in his defense, he has a constitutional right to do nothing.

ARGUMENT.

I.

This Is Not an Appeal Under §3731 of Title 18 and Consequently This Court Does Not Have Jurisdiction.

§3731 of Title 18 U.S.C. provides for direct appeal to the Supreme Court from the decision or judgment of a District Court sustaining a Motion in Bar, when the defendant has not been put in jeopardy. There are two definitions of "Motion in Bar." One interpretation is found in the opinon of the Court of Appeals for the Ninth Circuit in the case now before this Court. *United States v. Ben Blue.* [R. pp. 118-127.] The test there applied was: does the judgment of the District Court "bar further prosecution of the offense charged?" The second definition, as expressed in Footnote 17 in *United States v. Heath,* 260 F. 2d 623 (C. A. 9) is:

> "(17) 'Special pleas in bar * * * without entering into the facts of the offence, show that the defendant ought not at all be called upon to answer the indictment. The principal of these are a previous acquittal, conviction, attainder, and pardon * * *.' 1 Chitty, Criminal Law, 451, 452-470 (4th Cooley Ed., 1899, pp. 1481-1484); 5 Longsdorf, Cyclopedia of Federal Procedure, §§ 2152-2157 (1929); 2 Bishop, New Criminal Procedure, §§742, 805, 2d Ed. 1913)"

There has been no previous acquittal, conviction, attainder or pardon of Ben Blue, hence the above definition of a "plea in bar" can have no application nor does it serve to confer jurisdiction on the Supreme Court in the pending case.

The Court of Appeals for the Ninth Circuit sitting *en banc* in the case of *United States v. Apex Distributing Company,* 270 F. 2d 747, decided that the second definition (requiring a look at the legislative history of the applicable provisions) was controlling. Thus in both the *Heath* and *Apex* cases the Ninth Circuit refused to certify an appeal from an order of the District Court dismissing an indictment to the Supreme Court under §3731 of 18 U.S.C. It is submitted that this case is similar to *Heath* and *Apex* in that the dismissal of the indictment was analogous to one under Rule 48(b) of the Federal Rules of Criminal Procedure, did not come under §3731 of Title 18 U.S.C., and thus did not involve the question of a "plea in bar." In short, the District Court exercised its inherent power to do justice and dismissed the action because the defendant could not have a fair trial.

This Court in *United States v. Mersky,* 361 U.S. 431 expressly refused to decide whether the appeal involved a plea in bar. It held that the appeal had to do with the construction of a statute and stated "in view of this conclusion, we need not pass upon the claim that the District Court sustained in effect a 'Motion in Bar'" (at p. 438). In separate opinions Justices Brennan and Whittaker stated that they were of the opinion that the Court had sustained a plea in bar. Justice Stewart in a dissenting opinion in which Justices Frankfurter and Harlan joined, said that the case was not one which involved either the invalidity or the con-

struction of the statute. They were further of the opinion that the case did not involve a Motion in Bar.

It is submitted that Justice Holmes employed the proper definition in *United States v. Storrs,* 272 U.S. 652, 654 when he said:

> "The statute uses technical words, 'a special plea in bar' and we see no reason for not taking them in their technical sense. This plea is not a plea in bar and the statute does not cover the case."

In any event, the District Court did not, under either definition, sustain a plea in bar. The Court specifically relied on *Boyd v. United States,* 116 U.S. 616 and *United States v. Heath,* 260 F. 2d 623 (C. A. 9) as indicated by the following statement:

> "The testimony here is that they correlate between the Internal Revenue Bureau and the Department of Justice and, indeed, it hardly seems necessary that there be any testimony to that effect because it is one Government, and all of the agencies work for one United States of America.
>
> I read the Boyd case, and I am satisfied that under the Boyd case and under the Heath case in the Ninth Circuit that under the circumstances peculiar to this case, and because the defendant has been compelled and will be compelled to come forward on the same matters as are concerned in this criminal case, to testify against himself, [Fol. 246] that the court should dismiss the Indictment and I will dismiss it on that ground alone." [R. p. 66.]

Dismissal of the indictment in *Heath* was in the interest of justice (similar to a dismissal under Rule 48-

(b) F.R.C.P.) on the ground the Government had lost records of the defendant necessary to his defense. It did not involve an appeal under §3731.

This Court said in *Carroll v. United States,* 354 U.S. 394, 400: ". . . appeals by the Government in criminal cases are something unusual, exceptional, not favored."

It is contended that the District Court's well considered judgment is in accord with its inherent right to do justice and is not one appealable under §3731.

It should be noted that the Appellate Court is not limited to granting relief under §3731 of Title 18, U.S.C. When the District Court abuses its discretion the writ of mandamus is available to the Government. *United States v. Igoe,* 331 F. 2d 766 (C. A. 7), is a tax case also involving §7201 of Title 26 U.S.C. Judge Igoe dismissed the indictment because the Government refused to agree to waiver of a jury trial. The Court of Appeals dismissed the appeal under §3731 but issued a writ of mandamus directing the District Court to reinstate the case, citing *United States v. Smith,* 331 U.S. 469.

It is respectfully submitted that this Court does not have jurisdiction of this case under §3731 of Title 18, U.S.C.

II.

The District Court Was Right in Dismissing the Indictment.

In *Boyd v. U.S.,* 116 U.S. 616 this Court said:

> "The practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced '*the worst instrument of arbitrary*

> *power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book'* since they placed *'the liberty of every man in the hands of every petty officer.'** This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. 'Then and there,' said John Adams, 'then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.'" (Emphasis supplied.)

Substitute for "revenue officer" the special agent investigating the Ben Blue case and the similarity is apparent. The Special Agent, through his supervisor, on November 1, 1962, notified Ben Blue, a well known theatrical artist who has been entertaining the America public for over forty years, that prosecution for tax evasion was being contemplated. [R. pp. 6, 115.] While the recommendation of prosecution was still under consideration, on April 9, 1963, without notice to Ben Blue the Government made a jeopardy assessment against him, seized over $150,000 of his assets and filed liens of record. The Revenue Officer who filed the levies and liens pursuant to the jeopardy assessment, knew that a criminal investigation was then pending, having received this information from Special Agent Freeman. [R. p. 53.]

The levies and liens filed constituted a seizure of all of Ben Blue's known assets. [R. p. 45.] The levies attached not only to properties owned at the time the

lien arose but also to after-acquired property. *Citizens National Trust and Savings Bank v. United States,* 135 F. 2d 527 (C.A. 9). Thus, the payment of any monies by Ben Blue after the lien date, would carry the taint of the statutory lien. He was thus hamstrung financially and, after issuance of the statutory deficiency notices, was required to file petitions to the Tax Court containing verification of facts concerning the same income involved in the proposed prosecution.

More than a year after the compelled petitions were filed, Ben Blue was indicted, The file upon which the Assistant United States Attorney acted contained copies of the Tax Court petitions. [R. p. 51.] It is fatuous to assume that the petitions were innocent addenda to the file. A reading of the transcript of testimony of the Regional Counsel's representative [R. pp. 31-43; 45-52], and the argument of Government Counsel [R. pp. 49-51] will reveal the concern of the Government with regard to the petitions. Until the District Judge ordered production of the petitions great mystery surrounded their then existence and their prior association with the prosecutive file. The District Judge remarked at one point: "The Court: What do you want to get from this witness now? I haven't learned much from him so far. I am frank to confess." [R. p. 42.] The parrying of questions and the Government counsel's objections occurred at the very moment copies of the petitions in question were in Assistant United States Attorney Schulman's file. [R. p. 51.]

The "instrument of arbitrary power" *Boyd v. United States,* 116 U.S. 616 (*i.e.* the practical right to require Ben Blue to file verified petitions to the Tax Court prior to indictment) was in the possession of Special Agent Freeman and he put it into effect.

The Government in its brief seems to take the position that Ben Blue's only remedy is a Motion to Suppress evidence. But the "shalt not" command of the Fifth Amendment is not couched in evidentiary terms. We are admonished that no person "shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty or property, without due process of law."

The District Court dismissed the indictment on the ground that Ben Blue could not have a fair trial because he had been compelled to be a witness against himself. The Court relied on *Boyd v. U.S.*, 116 U.S. 616 which this court in *Malloy v. Hogan*, 378 U.S. 1 referred to as that "great case." The same concept which was applied in the *Boyd* case should control here. As was said in *Boyd:*

> "Breaking into a house and opening boxes and drawers are circumstances of aggravation, but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of (the Fourth and Fifth Amendments). 116 U.S. 616, 630."
>
> "It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient and effects the sole object and purpose of search and seizure."

As the Chief of the Intelligence Division in the Los Angeles Division stated, civil liabilities were not generally assessed while a criminal investigation was in progress. [R. p. 59.] Nevertheless, Ben Blue was subjected to a jeopardy assessment and all of his assets were seized. This, without notice or any explanation whatsoever.

As was stated in *McCulloch v. State of Md.*, 4 Wheat. 316;

> ". . . The power to tax involves the power to destroy; . . . to carry it to the excess of destruction would be an abuse, to presume which, would banish that confidence which is essential to all Government." This Court has also said
>
> "Judicial supervision of the administration of criminal justice in the Federal Courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law,' and below which we reach what is really trial by force." *McNabb v. United States,* 318 U.S. 332, 340.

Section 6861(a) relating to jeopardy assessment and §7201 and §7206(1) (Title 26 U.S.C.) relating to criminal sanctions are not integrated parts of the Internal Revenue Code. The jeopardy assessment provision is civil in nature and is designed to provide for direct protection of the revenue. §7201 and §7206(1) are penal in nature. Obviously what has happened here is that the Special Agent implemented his criminal

case by using a Civil Code provision never intended for that purpose. If nothing else supports this conclusion the timing of the action does.

In November, 1962 the criminal investigation was in process. In April, 1963 jeopardy assessments were made and in August, 1964 the indictment was brought. It was known to the Special Agent, of course, that once the jeopardy assessments were made a Tax Court case would follow and Ben Blue would be required to file pleadings and in due course give evidence in the civil case. Meanwhile Ben Blue's assets had been seized and liens attached to all his assets including funds acquired subsequent to the filing of the liens. In the absence of any evidence in the file supporting a reason for the jeopardy assessment, it may be assumed that the Special Agent had in mind the fortification of his criminal case.

The Government in its brief belittles the effect of the compulsion stating that Ben Blue simply entered general denials to the deficiency adjustments resulting from the jeopardy assessment. There is no indication in this case that if Ben Blue owed the Government any money, any attempt would have been made to avoid the obligation. If the purpose had not been to put Ben Blue at a disadvantage by combining the jeopardy assessment with an indictment, the indictment could have been brought before the jeopardy assessment was made.

The Government itself recognizes the unfairness of making a jeopardy assessment when a criminal investigation is pending in its policy not to assess under those circumstances. Plainly, a person under indictment who has had his assets seized is under a disadvantage.

To repeat, the intervening jeopardy assessment is completely unexplainable unless it relates to the criminal case and, "though the law itself be fair on its face and impartial in appearance" *Yick Wo v. Hopkins*, 118 U.S. 356, if it is applied in such a way as to cause illegal discrimination, it "is still within the prohibition of the constitution."

With the myriad code provisions available to Government agents it is not surprising that occasionally sophisticated methods of oppression are resorted to. The statutory provisions in themselves may be innocent enough but they can be employed in a manner not contemplated by the Congress nor consistent with due process. When Special Agent Freeman set in motion the jeopardy assessment process he was employing a civil provision of the Internal Revenue Code which implemented the criminal prosecution recommendation already made against Ben Blue. Aside from the verified petition to the Tax Court, which followed in due course, Ben Blue was hamstrung financially. The District Court found at the time of the hearing a sufficient showing had not been made that the defendant was deprived of his right to employ counsel. [R. p. 67.] This is not to say, however, that Ben Blue has not been and will not be handicapped in defending himself. Aside from the self-incrimination aspect of the case he has not been accorded the usual procedure described by Special Agent Freeman's superior. [R. p. 59.] This goes deeper than a simple denial of counsel. As this Court said in *Rideau v. Louisiana*, 373 U.S. 723, 726-7:

> "Under our Constitution's guarantee of due process the person accused of committing a crime is vouchsafed basic minimum rights. Among these

> are the right to counsel, *Gideon v. Wainwright,* 372 U.S. 335, the right to plead not guilty, and the right to be tried in a court room presided over by a Judge . . . 'due process of law, preserved for all by our constitution, commands that no such practice as that disclosed by this record shall send any accused to his death.' *Chambers v. Florida,* 309 U.S. 227, 241."

In the dissent of Justices Clark and Harlan in the *Rideau* case they stated that while they disagreed with the result, they did not "believe it within the province of law enforcement officers actively to cooperate in activities which tend to make more difficult the achievement of impartial justice."

The actions of the Special Agent in this case should be measured with a "recognition that the American system of prosecution is accusitorial and not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay." *Malloy v. Hogan,* 378 U.S. 1. Or, as this Court said in *Boyd v. United States,* 116 U.S. 616, 635:

"Though the proceeding in question is devested of many of the aggravating incidents of actual search and seizure, yet as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest form; but illegitimate and unconstitutional practices get their first footing in that way, namely by silent approaches and slight deviations from legal modes of procedures. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed."

Conclusion.

It is respectfully submitted that the District Court correctly interpreted the many decisions of this Court previously cited and others such as *Griffin v. Illinois,* 351 U.S. 181; *Douglas v. California,* 372 U.S. 353; *Coppedge v. United States,* 369 U.S. 438; *Draper v. Washington,* 372 U.S. 487; *Gideon v. Wainwright,* 372 U.S. 335 in reaching its decision. Accordingly, the indictment was properly dismissed and this Court should affirm.

April 12, 1966.

Respectfully submitted,

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